DKT. NO. 22 - 6694

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

ABDIRAHAM HAJI-HASSAN	)
	)
v.	)
	)
STATE OF MAINE	)

ON PETITION FOR WRIT OF CERTIORARI TO THE CUMBERLAND COUNTY, MAINE SUPERIOR COURT

HAJI-HASSAN'S PETITION FOR WRIT OF CERTORARI

Abdiraham Haji-Hassan hereby submits his petition for a writ of certiorari to the Maine Supreme Judicial Court.

QUESTION #1:

Whether the state postconviction court misapplied *Strickland v. Washington*, 466 U.S. 668 (1984), by applying its "strong presumption of reasonable professional assistance" to a watered-down version of petitioner's ineffective assistance of counsel claim when the actual claim would arguably rebut the presumption.

QUESTION #2:

Whether in denying petitioner's claim that he received ineffective assistance of counsel when he was told by his lawyers that he stood a fair chance of success at trial, which caused him to decline an offer to plead down to manslaughter, the court misapplied *Lafler v. Cooper*, 566 U.S. 156 (2012), by not factoring into its assessment of the reasonableness of the advice that counsel had given up on the most compelling part of their alternative suspect case.

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TABLE OF AUTHORITIES

LIST OF PARTIES

The caption contains all the parties to this postconviction case.

There is no non-governmental corporation that is a party to this action (Rule 29.6).

There are no proceedings in any other courts that are directly related to this case.

CITATION OF OFFICIAL AND UNOFFICIAL DECISIONS IN THIS CASE

State v. Haji-Hassan, 2018 ME 42, 182 A.3d 145 (direct appeal from conviction).

Abdihraham Haji-Hassan v. State of Maine, Cumberland County Unified Criminal Docket, 18-2928 (order denying petition for post-conviction review) (November 22, 2021) [In Appendix]

Abdiriham Haji-Hassan v. State of Maine, Law Docket CUM-21-396 (memorandum of decision denying request for certificate of probable cause) (September 27, 2022). [In Appendix]

JURISDICTIONAL STATEMENT

The order of the Maine Supreme Judicial Court, sitting as the Law Court, denying Haji-Hassan's request for discretionary review, i.e., his petition for a certificate of probable cause, was entered on September 22, 2022.

The Superior Court order denying petitioner's ineffective assistance of counsel claim, was entered on November 22, 2021. When the Law Court denied Haji-Hassan's request for a certificate of probable cause the case was returned to the Superior Court.

28 U.S.C. §1257 confers jurisdiction on this Court to entertain a petition for a writ of certiorari seeking to appeal from a final judgment of a state's highest court denying a claim based on the assertion of a federal Constitutional right.

PROVISIONS OF LAW INVOLVED IN THIS PETITION SET OUT IN FULL

U.S. Const. Amend. VI: *In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.* (Italics added to show part pertinent to this petition)

U.S. Const. Amend. XIV: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppression insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (Italics added to highlight language pertinent to this petition)

Maine Rule of Evidence 404(b):

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.
(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
(1) *Character of the accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
(2) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608 and 609.
(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

CONCISE STATEMENT OF THE CASE

Abdiraham Haji-Hassan was charged with the murder of Richard Lobor on November 21, 2014, in Portland, Maine. He was convicted, on December 12, 2016, after a six-day jury trial in Cumberland County Superior Court.

The postconviction court described the shooting as follows:

> The shooting of Richard Lobor happened on an occasion when individuals later identified as Haji-Hassan, Lobor, Gang Majok and Mohammed Ashkir had been in the apartment of Michael Deblois. Deblois left the living room while his visitors were engaging in drug activity. At some point there was an argument, and Deblois came out to see what was happening. At that point he identified Haji-Hassan (whom he knew as "Jordan") as pointing a gun at Ashkir. When Lobor stepped between Haji-Hassan and Ashkir, Deblois saw Haji-Hassan point the gun down and shoot in a downward direction. Deblois testified that he then saw Haji-Hassan shoot Lobor in the leg. Deblois scrambled out of the room but heard Lobor say, "You don't know who you are f'ing messing with." Deblois testified he then heard a third shot and emerged to find that everyone else had left the apartment except Lobor, who was lying on the floor having been shot in the head.

Order Denying Post-Conviction, at 5 (footnote omitted) (Appendix).

To this account Petitioner would add a few details of trial testimony that were uncontradicted. As Deblois scrambled out of the room, he saw Majok rise from his seat and move towards the confrontation. "He stood up, zoom, and started going . . . " Tr.Tr.186:22-23. After Deblois turned away, he "heard a boom. And then within a couple seconds I heard a thud." Tr.Tr. 187:23-24. Then, "I could have heard a pin drop. . . . it could have only been 20 seconds, it could have been 45 seconds. It seemed like at least a minute." Then he heard "a little ruffling . . . like, maybe a couple jackets squeezed through the door . . . It could have been two people." T.Tr. 188:6-10 & 189:12. He said the time between the second and the third shots was "under two minutes." T.Tr. 307. The weapon was a .357 Magnum. T.Tr. 218-19.

Other details include that the argument was in an African language, which DeBlois did not understand. (T.Tr. 179:23 & 183). Despite Deblois's claim that the person he identified as

"Jordan" shot the gun into the floor, there was no bullet in the floor. Although the prosecution argued that Haji-Hassan/Jordan shot himself in the leg with a .357 Magnum, there was no blood other than Lobor's in the apartment, down the stairs, out the door or in the alleged getaway vehicle. T.Tr. 966:1-13. The silence Deblois described after the third shot, but before the "little riffling" of two people exiting, was strange if someone had just shot himself in the leg with a .357 Magnum. It is even stranger that the 'Haji-Hassan/Jordan' of the prosecution's narrative, having just shot himself in the leg, ran down the stairs and off into the night. The gun was never found. The prosecution contended that a fragment of the bullet was visible in an X-Ray of Haji-Hassan's leg; the defense disputed that point. Deblois rambled incoherently at times during the trial,[1] was "borderline delusional" in police interrogations after the shooting (Postconviction Order at 4), and was a schizophrenic, off his meds, 'blasting' crack cocaine when the shooting happened.

Based on this scenario, the court indicated that it would allow defense counsel to portray Gang Majok as an alternative suspect. He was a plausible suspect because he had the means and the opportunity to fire the fatal shot. He was last seen moving towards the argument in the small apartment and there was time within that "less than two-minute" span between the second and the third shot for Majok to wrest the gun away from Haji-Hassan and fire the fatal shot. Motive is cloudy because the argument was in an African language, so DeBlois could not provide any insight as to the nature of the argument. But what made Gang Majok a convincing suspect, much

[1] E.g., ". . . I sent a letter to the FBI once and a letter – on the Internet to the CIA once regarding a celestial or, uh, you know, a psychic event that took place. Nobody's interested. We're not going to – I'll be very surprised if we get anywhere with it. That's what it was about, a psychic incident that I was part of that lasted maybe the span of a whole evening from probably – now that I know, remember, 11:00 at night until like 6:30 in the morning. And I know that there is people involved and they are never going to say a word. And – and I personally think it messed things up in – in life for 20-something years." T.Tr.245:1-11. See also T.Tr. 246-248 & 265 (the shooting was foretold twenty-five years before).

more so than Haji-Hassan with his minimal criminal history, was that Majok shot men twice in comparable circumstances, i.e., to end arguments in small, crowded rooms. One resulted in murder, the other in a paralyzed victim. Yet defense counsel chose not to press for the admission of this highly relevant evidence of Majok's gun violence in comparable situations. As a result, when defense counsel suggested in closing argument that Majok was the shooter, they lacked the evidence that would have made him the compelling alternative suspect he was.

Haji-Hassan's conviction was upheld. *State v. Haji-Hassan*, 182 A.3d 145 (2018).

Haji-Hassan filed a pro se post-conviction petition alleging ineffective assistance of counsel. The petition was amended when new counsel below entered his appearance. There were two main claims. One was that Haji-Hassan's defense team of two lawyers did not press for the admission of the evidence of Gang Majok's gun violence in comparable circumstances to prove that Gang Majok was the true shooter. Second, counsel was ineffective in advising Haji-Hassan that he had a good chance of winning, which caused him to decline an offer to plead down to manslaughter, when they had already given up on advancing the most compelling aspect of their alternative suspect defense.

Delayed by COVID-19, a testimonial hearing was eventually held on July 1, 2021. Haji-Hassan testified. Petitioner also introduced numerous documentary exhibits for the purpose of providing a sense of the wealth of information available to prove that Gang Majok was a very viable alternate suspect. The State of Maine had conducted several criminal prosecutions against Gang Majok for shootings similar to the one for which Haji-Hassan was on trial, so there was little chance the prosecution would deny the shootings happened or that they were provable. *See Maine v. New Hampshire*, 532 U.S. 72, 749-755 (2001) (explaining judicial estoppel). Petitioner's counsel made that clear that his interest in the documents was not their contents per

se, but in what they told about the wealth of evidence that should have been tapped by the defense to make their alternative suspect case. "[Y]ou've got police officers that have been investigating the case, prosecutors working the case, civilian witnesses. You've got all of these people that you can bring in to court to establish that Mr. Majok murdered one person and shot somebody else in the back." Hg.Tr. 155:11-25.

For example, Exhibits 1 & 2 were Majok's indictment, and his judgment and commitment for murder (30-year sentence). Exhibits 4 & 5 were his Information for Class A elevated aggravated assault with a firearm, and his judgment and commitment for a 20-year sentence concurrent with murder sentence. Exhibits 11-18 were various newspaper articles describing Majok's criminal rampages. Exhibits 11-12, 14, 16 & 18 described his May 2015 murder of a 19-year-old bystander, Trey Arsenault, whom Majok killed while firing a dozen shots wildly around a crowded recording studio. Exhibit 13 is about Majok's guilty plea to shooting a man in the back outside Sangillo's restaurant in January 2014. The story recounts that the victim was paralyzed and had filed a civil lawsuit against Majok and the bar. Exhibit 15 is a *Bangor Daily News* article about Majok headlined, "Two High-Profile Shootings Linked by Same Alleged Gunman." See also Hg.Tr. 116-119.

The post-conviction court *re*framed Haji-Hassan's claim, however, as if he were alleging ineffective assistance for not introducing *these documents* at the trial. The court denied the claim on the grounds that the news stories were inadmissible hearsay and many were not even written until after the trial. See Order at pages 6-7. The court also wrote, "Haji-Hassan's argument, therefore, essentially comes down to whether trial counsel was ineffective in not offering the evidence that at the time of Haji-Hassan's trial Majok had been indicted for murder. . . On its face, the mere fact that those charges had been brought – in the absence of any evidence as to

what had transpired and any possible relationship or similarity to the murder of Richard Lobor – would not be admissible." Order at page 7. The court also wrote, "Even a conviction would have been inadmissible under Rule 404(b)." Order at page 9. However, Haji-Hassan point was not that these documents should have been admitted at the trial. His point was that they showed that there were *witnesses* who should have *called* at the trial to make their alternative suspect case. There was plenty of extant evidence to draw upon to prove Gang Majok's use of gun violence in circumstances comparable to the crime for which Haji-Hassan was on trial., making Majok a more convincing suspect than the defendant.

Regarding ineffective assistance of counsel in advising Haji-Hassan to go to trial rather than accept the plea offer, the court found that the petitioner's testimony that he was advised he had a 70% chance of success was not credible. Nevertheless, the court reframed the issue by assuming that Haji-Hassan had probably been told he had a fair chance of success at trial because the eyewitness, DeBlois, had so many credibility issues. The postconviction court held that this version of their advice, optimistic but not phrased as a 70% chance of success, would have been reasonable because DeBlois' credibility was vulnerable to impeachment. Postconviction Order at pages 4-5.

Haji-Hassan's request for discretionary review was denied by the Maine Supreme Judicial Court, sitting as the Law Court, with this statement: "After review of the record, the Court has determined that no further hearing or other action is necessary to fair disposition." Order Denying Certificate of Probable Cause (September 27, 2022), in Appendix. The Law Court provided no detailed analysis in denying discretionary review.

ARGUMENT

QUESTION #1: Whether the state postconviction court misapplied *Strickland v. Washington*, 466 U.S. 668 (1984), by applying its "strong presumption of reasonable professional assistance" to a watered-down version of petitioner's ineffective assistance of counsel claim.

Strickland v. Washington, 466 U.S. 668 (1984), established a criminal defendant's right to have a defense attorney who will "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. The question of whether defense counsel has brought such skill and knowledge to bear is to be filtered through "a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (emphasis added). The demanding standard of a strong presumption is premised on the expectation that it will be applied to all ineffective assistance of counsel claims, even the most troubling. It was never intended that the most challenging claims, involving the most troublesome trial tactics, would be allowed to be reframed by the court to pass this standard in watered-down version.

In Haji-Hassan's case, the essence of his lawyers' troubling trial tactics was to forego fighting for the admissibility of clearly relevant evidence of Gang Majok's gun violence, which would have made him a compelling alternative suspect. The court minimized the claim by recasting it as whether counsel should have introduced Gang Majok's indictments and newspaper stories about his violence. That was clearly not Haji-Hassan's claim. His claim was that defense counsel should have called witnesses to prove the gun violence. There were clearly many such potential witnesses to be investigated and subpoenaed since newspaper stories were written that named them. The same prosecutorial authority who prosecuted Haji-Hassan for the murder of Rich Lobor, i.e., the State of Maine, also prosecuted Gang Majok for his gun violence, so the

prosecution could not dispute the violence was provable. By framing the issue as whether newspaper stories should have been admitted into evidence, however, the postconviction court avoided grappling with the real issue.

Haji-Hassan's claim of ineffective assistance of counsel was substantial. There was no dispute that Gang Majok was present at the scene of the fatal argument on November 21, 2014. There was also no dispute that he had grievously wounded one man and killed another to settle heated arguments in crowded rooms on two other recent occasions. Haji-Hassan's lawyers were aware of Majok's cases. They understood that a body of evidence existed out there in the world to harvest and introduce as evidence under Me.R.Evid. 404(b). The evidence would be compelling to a jury.

Yet, there was also no question that defense counsel did not press, or even prepare to fight, for the admissibility of Majok's pattern of gun violence under Me.R.Evid 404(b). One of Haji-Hassan's lawyers testified, "We did not think – we couldn't find a way to make it – that we could – we couldn't find a good faith ground to get it in." Hg.Tr. 196:16-17. Also, "My memory is . . . discussing it and – and really seeing no way to get it in." Defense counsel did not explain their legal research or thought process with any specificity.

Closing argument brought defense counsels' ineffectiveness to the fore. Arguing that Gang Majok was a more likely shooter than their client, counsel pointed to evidence that Majok was 5'5", the victim was 6' tall, and the fatal bullet was said by the State's ballistics expert to have, *possibly*, entered the victim on an upward trajectory. However, without evidence of Majok's pattern of ending arguments with gunfire, counsel's suggestion fell far short of the mark. Defense counsel essentially argued to the hole *they* had left in their case.

Defense counsels' lack of preparation on the law makes the claim of ineffective assistance of counsel serious and troubling. Maine law has long recognized that so-called "bad acts evidence" is admissible if the proponent can show "some sort of logical or experiential 'nexus' . . . other than a general propensity." Field & Murray, *Maine Evidence*, §404.8, at 139 (4th ed. 1997). Maine decisional law contains many instances of prior bad acts evidence admitted *against* a defendant. Prosecutors routinely frame the bad acts evidence as relevant to a particular purpose and thus avoid the prohibition against propensity evidence. *See, e.g., State v. Shuman*, 622 A.2d 716, 718 (Me. 1993) (threats against others admitted on showing of nexus to crime against victim). *See also State v. Anderson*, 152 A.3d 623, 627 (Me. 2016) (defendant's prior drug dealing with others admissible to prove drug dealing at issue in trial). Identity was a viable nexus. *See State v. Joubert*, 603 A.2d 861, 866 (Me. 1992) (bite mark inflicted in out-of-state case admissible as characteristic behavior on issue of identify); *State v. Mitchell*, 4 A.3d 478, 485 (Me. 2010) (citing use of alternative suspect evidence to establish identity, motive, opportunity, and "signature features"); *State v. Smith*, 551 A.2d 449 (Me. 1988) (Mem.Dec.) (prior thefts admitted to prove alleged thefts because distinct similarities showed knowledge, motive, and intent).

Trial counsel also expressed no clear awareness of "reverse 404(b) evidence." *See, e.g., United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984 ("However, risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense"). *See also, e.g., Ferry v. Commonwealth*, 234 S.W.3d 358 (Ky. 2007) (citing authorities); *Norwood v. State*, 95 A.3d 588 (Del. 2014) (citing authorities). See also Comment, "Incomplete Justice: Plugging the Hole Left by Reverse 404(b) Problem," *80 U.Cinn.L.Rev.*

1049 (2012); "Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third-Parties," 79 *U Colo. L Rev.* 587 (2008); "Admissibility of Evidence of Commission of Similar Crime by One Other Than Accused," 22 ALR5th 1 (first published 1994)..

The court's handling of Haji-Hassan's post-conviction claim suggests that the strong but *rebuttable* presumption of reasonable professional assistance established by *Strickland* became an irrebuttable presumption when it was applied to a repackaged, watered-down version of petitioner's actual claim. Haji-Hassan's trial was not the reliable adversarial testing of the prosecution's case that it should have been because the jury never learned that the 5'5" person who was last seen moving towards the confrontation, and who was known to handle a gun, had shot others in similar circumstances.

Question #2: Whether in denying petitioner's claim that he received ineffective assistance of counsel when he was told by his lawyers that he stood a fair chance of success at trial, which caused him to decline an offer to plead down to manslaughter, the court misapplied *Lafler v. Cooper*, 566 U.S. 156 (2012), by not factoring into its assessment of the reasonableness of the advice that counsel had given up on the potentially compelling part of their alternative suspect case.

In *Lafler v. Cooper*, 566 U.S. 156 (2012), the Court held that defendants are entitled to the effective assistance of counsel during plea negotiations. Citing *Strickland*, *supra*, the Court in *Lafler* wrote the "performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness." *Lafler,* 566 U.S. at 163 (internal cites and quotes omitted).

Shortly before trial, the prosecution extended an offer to Haji-Hassan to plead down to manslaughter (from murder) for a sentence of 25 years, all but 12.5 years suspended. Haji-

Hassan testified that one of his lawyer's told him that he had a 70% chance of winning a trial. The petitioner testified that he declined the offer based on this advice. The lawyer whom he identified as uttering the percentage was not called by the prosecution to testify at the postconviction hearing. His other lawyer was called, however, and she testified that she did not utter a percentage and did not hear co-counsel utter one, but it was also true that she did not attend every meeting co-counsel had with Haji-Hassan. Thus, Haji-Hassan's testimony about a 70% chance of acquittal was only partially controverted. Nevertheless, the court found testimony about a percentage not credible. The court did find, however, that if counsel had told Hassan he had "a fair chance" of success at trial (without a specific percentage), the advice would have been reasonable. That was because the credibility of the eyewitness, DeBlois, was subject to impeachment due to his state of mind at the time of the offense. Postconviction Order at 4-5.

The problem is that the court ignored that defense counsel had given up on pressing for evidence that made the alternative suspect more plausible. The court never addressed whether a fair chance would have been reasonable advice given that defense counsel had chosen not to fight for admission of 404(b) evidence that Gang Majok's modus operandi was gun violence to end arguments. Objectively reasonable defense counsel would have warned Haji-Hassan that, even if there were grounds to impeach the eyewitness's lack of credibility, there were serious risks in going to trial without a compelling alternative suspect case. Such evidence existed, and its admissibility was supported by Me.R.Evid. 404(b), but, as counsel admitted, they had given up on fighting for it. Since they controlled that decision, and those risks, the reasonableness of their optimistic assessment raised serious questions that the court did not address. It seems only logical that counsel's advice that Haji-Hassan stood a fair chance of winning could not deemed

reasonable without explaining how their abandonment of the most compelling part of their alternative suspect case affected his chances of success.

Dated at Portland, Maine this 15th day of December 2022.

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